CANADA / JUDGMENT

D.C.W. v. N.A.W.

2005 BCSC 614

COURT
Supreme Court of British Columbia

DECIDED
22 April 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

D.C.W. v. N.A.W.,

2005 BCSC 614

Date: 20050422

Docket: E0449

Registry: Courtenay

Between:

N.A.W.

Plaintiff

And

D.C.W.

Defendant

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for the Plaintiff

C. Morris

Counsel for the Defendant

S. McPhee

Date and Place of Trial/Hearing:

March 2, 2005

Nanaimo, B.C.

[1] Two motions were brought on for hearing on March 2, 2005. The first motion was brought by Ms. N.A.L., the former Mrs. N.A.W., on December 3, 2004, for an order to adjust child maintenance for 2003 and 2004 to correspond with the actual income of the defendant D.C.W. for the year 2003.

[2] Mr. D.C.W. responded with a motion on January 10, 2005, seeking cancellation or variation of child support and spousal support orders made by Goepel J. in April 2004, any such variation to be retroactive to January 1, 2004, and a declaration that T.C.W. is no longer a child of the marriage. There was other relief claimed by Mr. D.C.W. to which I shall refer later. The background to the relationship between these parties is set out in the Reasons for Judgment of Mr. Justice Goepel of April 6, 2004. Those reasons followed a four-day trial in January 2004. The order flowing from those Reasons was entered August 11, 2004. It provides that:

§ Ms. N.A.L. have sole custody and day to day care and control of T.C.W.;

§ the defendant pay child support for T.C.W. and his older brother D.W.W. to [ ], 2003, at which point D.W.W. ceases to be a child of the marriage and child support is reduced to $568 per month for the maintenance of T.C.W., payable until further order of this court;

§ the defendant would provide medical and dental coverage for T.C.W. so long as it is available through his employment;

§ that D.C.W. pay spousal support at $1,000, an amount representing a reduction from an interim order in the amount of $1,700 a month, the reduction to commence as at January 1, 2003;

§ arrears of spousal and child maintenance were set as at December 31, 2003 at $8,428.07, and ordered to be paid at $200 per month commencing April 2004 and thereafter monthly until paid in full;

[3] Further declarations relating to Mr. D.C.W.'s pension followed, Mr. D.C.W. was ordered to provide a certified copy of his birth certificate and each party was ordered to bear their own costs.

[4] In his Reasons for Judgment Goepel J. made the following findings of fact:

§ The plaintiff, now Ms. N.A.L., both during and after the marriage has borne the financial consequences of child care. She worked periodically before 1996 and in that year started to work in a daycare centre. At the time of separation in 2000 she was not educationally qualified to enrol in college or university. Since separation she has completed her Grade 12, obtained a diploma in Early Childhood Education at N.[ ] College, and has part of her first year of a bachelor's degree at the University of Victoria.

§ The parties had accumulated significant debt during the marriage in spite of a combined family income close to $100,000 per year. Most family assets were liquidated to pay down debt after the parties separated. Both parties continue to be in debt at the time of trial.

§ During the marriage Mr. D.C.W. worked in the forest industry in Woss. He lived in or near Woss during the week while at work. He saw his family on weekends while he was working. Since separation, Mr. D.C.W. has moved to B.[ ] and has taken up residence with a new partner. This has meant a commute of about 2½ hours each way to and from work on a daily basis. This has increased Mr. D.C.W.'s expenses for vehicle operation and maintenance.

§ Mr. D.C.W. earned just over $89,000 in 2001, and just under $74,000 in 2002. The trial judge found that Mr. D.C.W. earned $68,000 in 2003, but that was based on evidence presented very early in 2004 before the documents necessary to file income tax returns were available. (all these numbers are rounded in these Reasons)

§ Ms. N.A.L. earned $40,000 in 2001 and $38,200 in 2002. She was found by the trial judge to have earned just under $34,000 in 2003, again based on evidence presented early in 2004 before the documents required to file tax returns were available. (numbers again rounded in these Reasons)

§ The collective agreement regulating Mr. D.C.W.'s employment was subject to binding arbitration at the time of trial and, depending on whether management's position prevailed in that binding arbitration, Mr. D.C.W.'s income might continue to decline.

§ Ms. N.A.L.'s income was projected at $22,500 for 2004, a decline from 2003 attributable to restructuring at her place of employment.

§ Mr. D.C.W. had no assets to speak of, there being more owing on his vehicle assets than they were worth at trial. Mr. D.C.W. owed over $10,000 on credit cards and faced tax reassessment because he had wrongly deducted child support payments from his income.

§ Ms. N.A.L.'s assets consisted of a truck worth approximately $1,000 more than was owing on it and a cabin valued at $15,000. She owed $12,000 on her credit cards.

§ Each party claimed monthly expenses at around $5,000 although Ms. N.A.L.'s actual expenses were considerably less at the time of trial because she had favourable living arrangements involving either no rent payments or reduced rent payments that were not expected to continue.

§ Ms. N.A.L. was found to be in need of financial support, was found not yet entirely self-sufficient as a direct result of the marriage. Spousal support had been set on an interim basis assuming an imputed monthly income of Mr. D.C.W. at $6,300. At trial, Mr. D.C.W.'s income was found to be less than that and it was stated "...it may well fall further".

§ For the purposes of ongoing child support Mr. D.C.W.'s income was imputed at $70,000 for 2004.

§ Insofar as spousal support was concerned the trial judge found that Mr. D.C.W. "...continues to earn a significant income." Without reference to any specific amount or any amount different than the income imputed for child support purposes.

[5] At the trial Mr. D.C.W., through counsel, acknowledged that the child T.C.W. continued to be a child of the marriage, and as a result there were little in the way of facts found by the trial judge relating to T.C.W.. Child support for T.C.W. was set at the Guideline amount of $568 per month based on the imputed $70,000 income. Spousal support was reduced from the interim amount of $1,700 a month to $1,000 per month.

[6] Eight months after the Reasons of Goepel J. were handed down, four months after the order flowing from those Reasons was entered, Ms. N.A.L. applied for an adjustment to the child maintenance order for the years 2003/2004 to reflect Mr. D.C.W.'s actual 2003 income. Mr. D.C.W. responded a little over a month later with an application to review and cancel or vary the child support order for T.C.W. and the spousal support order in favour of Ms. N.A.L.. He also applied to vary both child and spousal support orders retroactively to January 1, 2004 to reflect his actual 2004 income. Mr. D.C.W. also seeks a declaration that T.C.W. is no longer a child of the marriage. Mr. D.C.W. also seeks an order that T.C.W. provide confirmation of full-time enrolment in an educational facility, that he be provided all reports from any such educational facility and that he be granted an authorization permitting any educational facility in which T.C.W. is enrolled to provide information directly to Mr. D.C.W.. He further seeks an order that T.C.W. provide financial information including pay slips, T4 slips and income tax returns and assessments to Mr. D.C.W. at such frequency as the court may direct.

[7] Other relief sought by Mr. D.C.W. I was informed could be granted by consent and I make on the basis of that consent the following orders:

(1) Beginning June 30, 2005, and each June 30 and December 31 thereafter, for so long as child or spousal support orders are in effect, the plaintiff and the defendant shall exchange copies of all payslips or salary cheque attachments for the preceding six months, from all income sources;

(2) Beginning June 1, 2005 and each June 1 thereafter for so long as child or spousal support orders are in effect, the parties shall exchange all employer-issued income information, all other taxable income slips issued from any source, and all assessment notices from Canada Customs and Revenue Agency relating to the previous taxation year.

[8] As the balance of the argument was devoted to the relief sought by Mr. D.C.W. I shall deal with it first.

[9] The parties agree that for Mr. D.C.W. to succeed in the in the remaining relief claimed he must show that there has been a material change in the circumstances since the order was made.

The Law

[10] In Willick v. Willick, [1994] 3 S.C.R. 670, Sopinka J. at p. 688 said:

In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

[11] Willick arose out of a child support order. In 1995 the Supreme Court of Canada dealt with the application of the threshold test for material change in circumstances as it related to a spousal support order in L.G. v. G.B., [1995] 3 S.C.R. 370. In that case a spouse seeking variation of a spousal support order relied on, as material change in circumstance, that the spouse to whom the support was payable had taken up cohabitation with another man. The trial judge found that at the time the spousal support order under attack had been made both the paying spouse and the trial judge knew that the recipient was "seeing" someone else and that it was foreseeable that they would cohabit. Under those circumstances the Supreme Court of Canada affirmed the trial judge's decision that cohabitation could not meet the threshold test for material change in circumstances as set out in s. 17(4) of the Divorce Act., R.S.C. 1985, c. 3 (2nd Supp.), having been foreseen at the time the original order was made.

[12] Both of those decisions were considered by the Court of Appeal in the decision T.L.A.T. v. W.W.T., [1996] B.C.J. No. 1577 where Newberry J.A. speaking for the court reviewed both of the decisions in the Supreme Court of Canada and said:

Closer to the mark, perhaps, is the formulation given by Proudfoot J.A. in Carter v. Carter 1991 34 R.F.L. (3d) 1 (B.C.C.A.), where she stated that a court will vary a support order only where it finds a change that is "substantial, unforeseen and of a continuing nature."

[13] On two separate occasions in his Reasons, Goepel J. refers to the possibility that Mr. D.C.W.'s income will be reduced further from the levels set out in the evidence before him. The first at para. 19 of his Reasons refers to the then undecided binding arbitration arising out of a labour dispute that had shut down the forest industry, and the second at para. 40 again refers to the defendant's income being less at the time of trial than it had been when interim spousal support had been set and Goepel J. goes on to say that Mr. D.C.W.'s income may well fall further.

[14] It is clear to me that any reduction in his income about which Mr. D.C.W. now says is a material change in circumstance was within the contemplation of both the parties and the trial judge when spousal support was set in April of 2004, that it was "foreseeable" in the language of the Supreme Court of Canada, and does not constitute a material change in circumstance.

[15] With respect to Ms. N.A.L. Goepel J. projected income of $22,470 for 2004. Ms. N.A.L.'s actual 2004 employment was just over $32,000, and of that her income from full-time employment as a daycare worker was $28,200. The balance she earned caring for a friend's disabled child on weekends. That secondary source of income is no longer available to her. I find the discrepancy between projected income and actual daycare income (net of the weekend

income) in 2004 not a material change sufficient to warrant or permit variation in the spousal support order.

[16] Other matters raised in argument include the fact that Ms. N.A.L. has now purchased a condominium unit. The evidence shows that she has less than $10,000 equity in that condominium unit, with a mortgage debt in excess of the total debts owing by Mr. D.C.W..

[17] In all of the circumstances Mr. D.C.W. has failed to show a material change in the condition, means, needs or other circumstances of either himself or Ms. N.A.L. sufficient to permit cancellation or variation of spousal maintenance as ordered by Goepel J. and that application is dismissed.

Child Support

[18] Since the judgment in this matter was handed down T.C.W. has completed high school without graduating from grade 12, and has turned 19. He did not graduate because he was several courses short of the requirements for graduation. His career goal is to enrol in N.[ ] College in the plumbing and heating course which commences each September and lasts for 12 months. Because he lacked the necessary academic qualifications T.C.W. was unable to enrol in that course in September 2004. He has been taking upgrading courses to complete his high school credentials and the evidence shows that he is spending about 10 hours per week in study or in class. He is working part-time at a local restaurant.

[19] Ms. N.A.L.'s motion seeks adjustment in child support for T.C.W. for the years 2003 and 2004, such adjustment to reflect the actual income of the defendant Mr. D.C.W. for those years. Mr. D.C.W.'s motion seeks a declaration that T.C.W., born [ ], 1986 is no longer a child of the marriage, a variation of child support obligations retroactively to January 1, 2004, and termination of those child support obligations.

[20] At the time of trial T.C.W. was in high school and the expectation was that he would successfully complete his Grade 12 in June of 2004. That did not happen. T.C.W. was short one math course and three English courses, and was thus unable to pursue his planned post-secondary education, a one-year plumbing and heating certificate course at N.[ ] College in C.[ ].

[21] Instead, T.C.W. has taken remedial or upgrading courses to complete those high school credits that are required before he can enrol at N.[ ] College. During the fall of 2004 he took one math and two English courses. The math course continues into the spring of 2005 and he is also taking his third and final English course. I accept the evidence that T.C.W. is provisionally accepted into the plumbing and heating course at N.[ ] College, subject to successful completion of the remaining high school credit courses.

[22] In the meantime, T.C.W. is spending approximately 10 hours per week or less in class work and homework. He is working part-time as a dishwasher and food delivery person at a local restaurant. He attempted to gain additional employment at the local ski hill but unusually warm weather and lack of snow combined to reduce operations of the local ski hill and T.C.W. was not called to work.

[23] T.C.W. has some difficulties with certain aspects of his schoolwork. An assessment done when he was younger indicates difficulties in reading and writing, and according to Ms. N.A.L. those difficulties have persisted. There is no suggestion that T.C.W. lacks intelligence, but his reading and writing problems do require that he spend more time to absorb the same material than others might require. Mr. D.C.W. does not completely accept that part of T.C.W.'s delay in completing his education is caused by a learning disability or something like it, saying rather that T.C.W. is not applying himself. He makes other allegations as well, having to do with drug and alcohol use and aggression, which I find have been unsubstantiated.

[24] Mr. D.C.W. argues that T.C.W. is now an adult in the eyes of the law, and he is capable of working more than he is without significantly interfering with the 10 hours he must put aside each week for study and class work. Mr. D.C.W. argues that T.C.W. is capable of supporting himself. Mr. D.C.W. says through counsel that if T.C.W. wants to pursue post-secondary education he will help if he can, and Mr. D.C.W. offers to provide T.C.W. with room and board at his home in B.[ ] which is significantly closer to N.[ ] College than the home T.C.W. shares with Ms. N.A.L..

[25] That last offer, while it may be genuine, is not one that is realistic in the present circumstances. On all of the affidavit evidence it is quite clear that the relationship between Mr. D.C.W. and his youngest son T.C.W. is at best strained. Significantly, and to his credit, Mr. D.C.W. does not argue that one of basis on which T.C.W. is no longer a child of the marriage is that T.C.W. has unilaterally severed his relationship with his father. The fact remains however that the two are not on the best of terms and it is highly unlikely in my view that T.C.W. will take his father up on the offer of room and board in the fall of 2005.

[26] I have the clear impression that T.C.W. is at somewhat of a crossroads. If he is not able to get a trade, given his learning disability, however slight, his future may be fairly significantly and adversely affected. On the other hand, if he is able to get the plumbing certificate, which will launch him into an apprenticeship, his future will be far rosier.

[27] In the meantime, T.C.W. says he is trying to save money because once he starts school in September of 2005 he will not be able to work, and given his slight learning disability, I accept that it would not be wise if T.C.W. were required to maintain some form of part-time employment while trying to complete the one-year plumbing and heating course.

[28] Both counsel have pointed to Farden v. Farden, [1993] B.C.J. No. 1315. Applying the factors as set out by Master Joyce in that case the following appears:

1. T.C.W. is enrolled in a part-time course of studies designed to complete his Grade 12 educational requirements;

2. There is no evidence whether T.C.W. has applied for or is eligible for student loans or other financial assistance;

3. T.C.W.'s career plan is to enrol full-time at N.[ ] College in the plumbing and heating course, that course to lead to a trade apprenticeship, and that is a reasonable and appropriate plan in all of his circumstances, including his mild learning disability;

4. T.C.W. is contributing to his own support through part-time employment, attempted to get more part-time employment but seasonable factors prevented it;

(i) T.C.W. earned $5,900 in 2004, and was unable to work at least as a delivery person for some months while his driver's licence was under suspension;

(ii) His income for 2005 should, therefore, be somewhat higher;

5. T.C.W. has just turned 19;

6. T.C.W.'s past academic performance has been mixed, part of the explanation for that can be his mild learning disability but there is no reason to believe that T.C.W. will not succeed in his chosen educational path;

7. There is no evidence of what, if anything, the parents planned by way of education for T.C.W. or when those plans may have been discussed;

8. Mr. D.C.W. has commendably not argued that T.C.W. has unilaterally terminated his relationship with his father.

[29] Counsel have suggested that if I do not end the child support order, that I may suspend it until T.C.W. resumes his full-time schooling in September of 2005.

[30] I find that T.C.W.'s educational plans are reasonable and that it is necessary that he have some financial support from Mr. D.C.W. to further those educational goals. I find further that there is a significant risk that T.C.W.'s career plans would be adversely affected if Mr. D.C.W. were allowed to stop child support payments entirely or to suspend payments until T.C.W. enrolled full-time at N.[ ] College. In all of the circumstances, I am not prepared to vary, suspend or end the child support payments for T.C.W..

[31] I order that T.C.W. provide to Mr. D.C.W. as early as practicable but no later than October 31, 2005, a letter, certificate or other document issued by N.[ ] College confirming his enrolment full-time at N.[ ] College, and if that is not supplied, Mr. D.C.W. has liberty to reapply. I further order T.C.W. to provide to Mr. D.C.W., or to supply with Mr. D.C.W. with sufficient written consent that he can obtain for himself, all reports, grades, transcripts or other materials ordinarily issued by N.[ ] College to a student with respect to that student's academic progress.

[32] For so long as Mr. D.C.W. is paying child support on behalf of T.C.W. I order that Mr. D.C.W. be provided by Ms. N.A.L., or by T.C.W. or either of them, copies of all T4 slips, income tax returns, and notices of reassessment evidencing T.C.W.'s income from employment.

[33] Ms. N.A.L.'s application to recalculate child support to reflect Mr. D.C.W.'s actual income in 2003/2004 would, if successful, lead to an order that Mr. D.C.W. pay $1,044 for those two years. That she brought the application in the first place, for that sum of money, is perhaps indicative of the approach both parties have taken to their litigation, litigation I am told by counsel has generated four volumes of pleadings.

[34] Were Ms. N.A.L.'s motion the only one brought, she would be ordered to pay the costs. Were Mr. D.C.W.'s motion the only one brought, he would be ordered to pay costs as he has not succeeded. If I order either party to pay costs, given their current precarious financial situation, I will be taking money from one or the other that either should better use, in Ms. N.A.L.'s case to maintain a home for herself and T.C.W., and in Mr. D.C.W.'s case to maintain his own home as best he can while meeting his child and spousal support obligations.

[35] In these circumstances no costs will be payable by either party.

"R.T.C. Johnston, J."

The Honourable Mr. Justice R.T.C. Johnston

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